ASEAN SECURITY PAPER MILLS SDN BHD

v.

PROVINCIAL INSURANCE (M) SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID MOHAMAD J
[CIVIL SUIT NO: D2-22-2458-89]
26 FEBRUARY 2000

CIVIL PROCEDURE: *Want of prosecution - Delay in prosecuting action - Whether delay inordinate - Whether inexcusable - Whether defendant seriously prejudiced - Whether there was substantial risk that a fair trial was not possible - Limitation*

On 21 November 1989 the plaintiff filed an insurance claim against the defendant for loss and damage by fire. Nine days later, the plaintiff entered judgement in default against the defendant. However, the judgement in default was set aside on 12 December 1989. The plaintiff went all the way to the Supreme Court to appeal against the decision. The appeal was finally dismissed in 1990. About five years later, the plaintiff filed a summons for directions. In response, the defendant filed an application to strike out the plaintiff's action on the grounds that there had been an inordinate and inexcusable delay on the part of the plaintiff in failing to take any steps to prosecute the action and, furthermore, that limitation had set in. The SAR dismissed the defendant's application and the defendant appealed.

Held:

[1] Although there was an inordinate delay on the part of the plaintiff it was not inexcusable. Even if it was inexcusable, the defendant had failed to show that the delay had caused substantial prejudice to them or that the delay had given rise to a substantial risk that it was not possible to have a fair trial.

[2] The action was filed well within the limitation period and the question of limitation did not arise at all.

[Appeal dismissed.]

Case(s) referred to:

Birkett v. James [1978] AC 297 ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Asean Security Paper Mills Sdn Bhd [1999] 2 CLJ 719 ***(refd)***

TM Feroze Khan & Ors v. Mera Hussain & TM Mohamed Mydin [1999] 4 CLJ 373 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 6, O. 25, O. 34 r. 8

For the plaintiff - CK Leong; M/s CK Leong & Co
For the defendant - Steven Thiruneelakandan; M/s Shook Lin & Bok

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Mohamad J:

This is an appeal from the decision of the senior assistant registrar on 7 September 1999 dismissing the defendant's application in encl. 46. Enclosure 46 is an application by the defendant to dismiss the plaintiff's action for want of prosecution under O. 34 r. 8 of the Rules of the High Court 1980 (RHC 1980) and also under the court's inherent jurisdiction.

This case has a very long history. The claim was filed on 21 November 1989. It is an insurance claim for loss and damage by fire in the sum of RM32,249,000, interests and costs. On 30 November 1989, the plaintiff entered judgment in default against the defendant. That judgment in default was set aside by the senior assistants registrar on 12 December 1989. The plaintiff appealed against that order to the judge in chambers. The defendant delivered its defence on 18 December 1989. On 4 January 1990 the judge dismissed the plaintiff's appeal. The plaintiff appealed to the Supreme Court.

According to the defendant's affidavit (encl. 45, para. 9):

> On 7th May 1990, the Supreme Court dismissed the Plaintiff's said appeal with costs and also dismissed the Plaintiff's supplementary Motion to adduce fresh evidence before the Supreme Court.

However, according to the affidavit filed for and on behalf of the plaintiff, (encl. 47, para. 5):

> 5. I refer to paragraph nine (9) of the said affidavit and I am advised by my solicitors and verily believe that the Plaintiff's Appeal was heard by the Supreme Court on 25 September 1990.

Whatever it is, it is not disputed that the appeal has been dismissed by the Supreme Court.

In his written submission in reply, learned counsel for the plaintiff brought to the attention of the court that on 29 September 1990, he had filed a notice of motion in the Supreme Court praying that, in brief, the order made orally on 25 September be reversed, or varied and modified so as

to correctly express the intention of its order, or, in any event, a re-hearing, in the interest of justice. I believe that the plaintiff was asking the Supreme Court to re-hear the appeal. According to the plaintiff that motion has not been heard.

This fact was only brought to the attention of the court in the written submission by the plaintiff's counsel. He also enclosed a copy of the motion in his written submission. That fact should have been deposed in the plaintiff's affidavit and the copy of the notice of motion enclosed as an exhibit therein. However the existence of that notice of motion is of no consequence to the appeal before me.

On 5 November 1992 the plaintiff was wound up by a court order in Companies Winding up Petition No. D6-28-200-92.

On 27 November 1995, the plaintiff filed the summons for direction. About one week later, on 4 December 1995, the defendant filed encl. 46, the application now in question, to have the action struck out for want of prosecution.

There is another action in Ipoh High Court involving the same subject matter, the same plaintiff but a different defendant. At the time I heard this appeal the trial of the Ipoh case was still going on. There was also a similar application in the Ipoh High Court case earlier. The application was dismissed by the High Court. Appeal to the Court of Appeal was also dismissed. The judgment of the Court of Appeal was reported – see *Commercial Union Assurance (M) Sdn. Bhd. v. Asean Security Paper Mills Sdn. Bhd* [1999] 2 CLJ 719; [1999] 2 MLJ 457. The defendant has applied to the Federal Court for leave to appeal thereto but the application is yet to be heard. I must say that the existence of that application is also of no consequence to this appeal before me.

Another point should be mentioned. Arising from the incident (the fire) a director of the plaintiff was charged for arson in the Sessions Court but was acquitted and discharged after the trial. This only happened on 26 November 1997.

In its affidavit in support of the application (encl. 45) the plaintiff said that since the dismissal of the plaintiff's appeal by the Supreme Court on 7 May 1990 the defendant failed to take any step to prosecute the action including failing to take any action to take out the summons for direction pursuant to O. 25 of the RHC 1980. (Actually, one week before the defendant's affidavit was filed, the plaintiff filed the summons for direction). The defendant also said that limitation had set in. The defendant

also said that there was an inordinate and inexcusable delay on the part of the plaintiff, resulting in substantial prejudice and/or risk of substantial prejudice to the defendant. The defendant enumerated the said prejudice or risk of such prejudice as follows:

(a) To prove the defence of fraud (set out in paragraph 26 of the Defence), the Defendant would have to rely, *inter alia*, on eye witness accounts as to the date, time and manner of the alleged fire. Owing to the passage of time since the alleged fire i.e. over six (6) years ago, there would be difficulty in locating these witnesses and even if located, their testimony is likely to be impared by the effluxion of time.

(b) The relevant personnel officers of the Defendant who were in charge of the matter at the material time i.e. one C.L. Wong and one Chan Kien Fatt have since left the employ of the Defendants.

(c) Further, one of the Defendant's principal witness, one Bernard Tan, who was the Defendant's Branch Manager, Ipoh, at the material time is also no longer in the employ of the Defendant.

(d) The Defendant contends that several of the documents involved in the submission of the claim are false and/or fabricated and unless the makers of these documents can be produced, it would seriously prejudice the position of the Defendant in establishing its defence at trial.

(e) In any event the suit herein has been hanging over the Defendants for more than 6 years.

The plaintiff replied as follows in paras. 8, 9 and 10 of the plaintiff's affidavit (encl. 47):

8. I refer to paragraph thirteen (13) of the said Affidavit and advised by my solicitor and say that the Writ of Summons herein was filed well within the stipulated limitation period in law against the Defendant.

9. I refer to paragraph fourteen (14) of the said Affidavit and am advised by my solicitor and verily believe that there is no delay on the part of the Plaintiff in prosecuting this action and if any, which is denied, it is not prejudicial and the Defendant suffers no prejudice. As the Court Appointed Liquidator, I had to gather the full details of the Plaintiff's background and seek advise from my solicitors before I was able to take the necessary steps to set down this action for trial. The Defendant themselves could have take steps to set down this action for trial or take out the Summons for Direction pursuant to Order 25 of the Rules of the High Court, 1980 any time after pleading was closed. In addition, the Defendant action of pursuing against the Plaintiff for their costs for the Supreme Court Appeal case which was last fixed for hearing on the 15 April 1994 have also hampered the setting down the action for trial. A

copy of the Defendant's Solicitor letter dated 31st December 1993 addressed to the Plaintiff's solicitors is shown to me and enclosed herewith as exhibit marked as "LTH-2".

10. I refer to paragraphs fifteen (15) and sixteen (16) of the said Affidavit and am advised by my solicitor and say that it is not true that the Defendant's witnesses named therein are untraceable as the said witnesses are available and are being offered to the Defence in the case of *Public Prosecutor v. N. Balasingam vide* Sitiawan Sessions Court arrest case No. MSS. (T) 62-4-90 and verily believe that there are various triable issues involved in this action and question of fact and law which can only be decided and determined at the hearing of this action.

Now the law. Many authorities, local and English, were cited. But as far as this court is concerned, I need only refer to one, the most recent decision of the Federal Court on the subject. The case is *TM Feroze Khan & 3 Ors. v. Mera Hussain & TM Mohamed Mydin* [1999] 4 CLJ 373; [1999] 4 AMR 4457. Chong Siew Fai (CJ Sabah and Sarawak), delivering the judgment of the court, citing *Birkett v. James* [1978] AC 297 at 318 laid down the principle as follows:

The power should be exercised only where the court is satisfied either:

(1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or

(2) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and

(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.

Learned counsel for the defendant did not rely on (1), rightly so. What this court has to decide is whether, in the circumstances of this case, there has been inordinate and inexcusable delay and, if so, whether the delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant.

Was there inordinate delay on the part of the plaintiff, in particular in taking out the summons for direction? The rule requires that the summons for direction be taken within one month after the pleadings are deemed to be closed. However, in this case, the plaintiff took out a judgment in default before the defence was filed. The judgment in default was set aside.

Appeal against the order setting aside the judgment in default went right up to the Supreme Court. According to the defendant the appeal was dismissed on 7 May 1990. The plaintiff said that the appeal "was heard by the Supreme Court on 25 September 1990." Whichever is the correct date, for the present purposes it is sufficient to say that it was in 1990.

Defence was filed on 18 December 1989. But even learned counsel for the defendant did not count the length of the delay from the expiry of one month from the date the pleadings were deemed to be closed, in view of the appeal. He counted from the date of the disposal of the plaintiff's appeal by the Supreme Court, 7 May 1990.

Whether the appeal was disposed of by the Supreme Court on 7 May 1990 or 25 September 1990 makes little difference in the circumstances of this case. The fact remains that the summons for direction was only taken out on 27 November 1995. The gap is about five years. In the circumstances, it is clear that there had been inordinate delay on the part of the plaintiff.

Is it inexcusable?

We have seen that due to the failure on the part of the defendant to file an appearance and defence in time, a judgment in default was obtained by the plaintiff. The defendant applied successfully to have it set aside. Appeals against the orders setting aside the judgment in default went right up to the Supreme Court, and was only disposed of in 1990. Even then there is a motion filed by the plaintiff seeking a rehearing, which, according to the plaintiff, until now has not been heard by Federal Court. In 1992 the plaintiff company was wound up. One of its directors was charged for arson and was acquitted and discharged on 26 November 1997. Applications and appeals in the related case in Ipoh were going on. Finally trial of the Ipoh case commenced and was still going on until the date I heard this appeal. The defendant too did not take the step that it now takes during the whole of that period.

The Court Appointed Liquidator of the plaintiff in his affidavit that I have reproduced earlier said that after the appointment he had to gather the full details of the plaintiff's background (bear in mind the plaintiff's stock in trade and most probably factory and office too, were destroyed by fire, whatever the cause) and seek solicitor's advice before he was able to take any necessary step to set down the action for trial.

In the circumstance I am of the view that the delay is not inexcusable.

But, even if it is inexcusable that is not the end of the matter. There is still another question to be determined, in brief, whether the delay has given rise to a substantial risk that is not possible to have a fair trial.

The defendant has given five reasons in support of its contention that the delay has caused substantial prejudice or risk thereof to the defendant, which have been reproduced earlier. The first three grounds concern the supposed difficulty for the defendant to get the witness due to the passage of time.

But, it was not disputed that the case in Ipoh was still going on at the time I heard this appeal.

In his written submission, learned counsel for the plaintiff said that in the trial of the Ipoh case learned counsel for the defendant had informed the court that the defendant had 30 to 40 witnesses, thus indicating that the witnesses were available. He said that the plaintiff had also served subpoena on Bernard Tan who according to defendant had left the employment of the defendant.

These facts should have been deposed in an affidavit, not in the submission. I disregard these statements.

However, considering the fact that the trial which, most likely involve substantially the same witnesses for both sides, I am of the view that it would not be a problem to subpoena them again when the trial of the case commences.

Further the decision of the High Court and the Court of Appeal in a similar application in the Ipoh case too has a bearing on this appeal.

The Ipoh High Court had dismissed a similar application in the Ipoh case. Appeal to the Court of Appeal was also dismissed. The citation has been given earlier in this judgment. Haidar Mohd. Noor JCA, delivering the judgment of the court said:

> The learned Judge then proceeded to consider that even if there was a delay, whether the delay gave rise to a substantial risk that a fair trial would not be possible or the delay was such as likely to cause or to have caused serious prejudice to the appellant. The appellant's counsel contended that since the appellant had raised the issue of fraud, the appellant would have to rely on witnesses account as to the date and manner of the alleged fire. Further, owing to the delay there would be difficulty in locating witnesses and even if located, their testimonies would be infirmed by effluxion of time. Counsel for the appellant contended also that certain key witnesses had since left the company. There were also certain documents which were false and the makers of the documents would have to be produced.

> In answer to the contention of the appellant's counsel, the learned Judge referred to the ongoing criminal trial against the owner of the respondent in the Sessions Court *vide* Criminal Trial 62-4-90. The witnesses that the appellant alleged to have gone missing were in fact witnesses for the prosecution in the said trial. The learned Judge, in our view, rightly held that it was implausible that the witnesses could not be located or that they would not be able to recollect the particulars and made a finding that there was no evidence of prejudice to the appellant or a substantial risk that a fair trial is not possible. We see nothing wrong with such a finding.

It is to be noted that the grounds raised in that application are the same as those raised here. Indeed, with the trial of that case having started and was still continuing there should now be no, or at least less, difficulty in locating the witnesses.

In the circumstance I am not satisfied that the alleged difficulty of tracing the witnesses has been proved.

Learned counsel for the defendant had also argued that due to the long delay, limitation had set in. This argument is a non-starter. The relevant date to consider is the date of filing the action, not when the case is disposed of. The action was filed well within the limitation period and therefore the question of limitation does not arise.

Another point was also raised by the learned counsel for the defendant. He said that the plaintiff did not give notice of intention to proceed as required by O. 3 r. 6 of the RHC 1980 before filing the summons for direction. This ground was not given either in the summons in chambers or the supporting affidavit. Anyway, as I am not hearing the summons in chambers, I do not think I should comment on it. The fact remains that the summons for direction was filed.

On these grounds I dismissed the appeal with costs.